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October 15, 2021

Via Electronic Mail, Facsimile, and Hand Delivery

J. Matthew DeLesDernier, Assistant Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Petition for Review of Order Disapproving Proposed Rule Changes, as Modified by Partial Amendment No. 1, to Amend Each Exchange's Fee Schedule to Add Two Partial Cabinet Bundles Available in Co-location and Establish Associated Fees, Release No. 34-93214; File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01

Dear Mr. DeLesDernier:

I am writing as counsel for New York Stock Exchange LLC ("NYSE"), NYSE American LLC ("NYSE American"), NYSE Arca, Inc. ("NYSE Arca"), NYSE Chicago, Inc. ("NYSE Chicago"), and NYSE National, Inc. ("NYSE National") (each an "Exchange" and collectively the "Exchanges"). Please find enclosed an updated version (original and three copies) of the Exchanges' Petition for Review of Order Disapproving Proposed Rule Changes, as Modified by Partial Amendment No. 1, to Amend Each Exchange's Fee Schedule to Add Two Partial Cabinet Bundles Available in Co-location and Establish Associated Fees, Release No. 34-93214; File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01. I am simultaneously sending you a copy of this petition for review by way of electronic mail at Secretarys-Office@sec.gov and by facsimile at 202-772-9324. We updated the Petition to address a formatting issue in the Table of Contents on page "i" – no further changes were made.

Any questions concerning this matter can be directed to me as counsel of record. My contact information appears above.

Sincerely,

Dentons US LLP

/s/ Douglas W. Henkin

Douglas W. Henkin

CERTIFICATE OF SERVICE

I, Douglas W. Henkin, counsel for New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc., hereby certify that on October 15, 2021, I served a copy of the attached Petition for Review of Order Disapproving proposed rule changes, as modified by partial amendment no. 1, to amend each Exchange's fee schedule to add two Partial Cabinet Bundles available in co-location and establish associated fees (Securities Exchange Act Release No. 34-93214; File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01) on J. Matthew DeLesDernier, Assistant Secretary, by electronic mail at Secretarys-Office@sec.gov, by facsimile at 202-772-9324, and by hand delivering the original and three copies to 100 F Street, N.E., Washington, D.C. 20549-1090.

Dated: October 15, 2021

/s/ Douglas W. Henkin
Douglas W. Henkin

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of: New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.	File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01

PETITION FOR REVIEW OF ORDER DISAPPROVING PROPOSED RULE CHANGES, AS MODIFIED BY PARTIAL AMENDMENT NO. 1, TO AMEND EACH EXCHANGE'S FEE SCHEDULE TO ADD TWO PARTIAL CABINET BUNDLES AVAILABLE IN CO-LOCATION AND ESTABLISH ASSOCIATED FEES

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I.
INTRODUCTION

On January 19, 2021, the New York Stock Exchange LLC ("NYSE"), NYSE American LLC ("NYSE American"), NYSE Arca, Inc. ("NYSE Arca"), NYSE Chicago, Inc. ("NYSE Chicago"), and NYSE National, Inc. ("NYSE National") (each an "Exchange," collectively, the "Exchanges") filed with the Securities and Exchange Commission (the "Commission") proposed rule changes to amend the Exchanges' fee schedules related to co-location services to add two partial cabinet solution bundles ("PCS Bundles") to be available in co-location and to establish associated fees (the "Proposed Rule Changes"). The Exchanges filed the proposed rule changes pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4[2] of the Act's implementing regulations.

On September 30, 2021, the Division of Trading and Markets ("Division"), acting pursuant to authority delegated by the Commission, issued an order disapproving the Proposed Rule Changes, as modified by Partial Amendment No. 1 ("Disapproval Order").[3]

Section 19(b)(2)(C) of the Act[4] directs the Commission to approve a proposed rule change submitted by a self-regulatory organization ("SRO") if the

[1] 15 U.S.C. §78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* Securities Exchange Act Release No. 34-93214 (September 30, 2021); File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSE-Arca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01).

[4] 15 U.S.C. §78s(b)(2)(C).

Commission finds the change comports with the requirements of the Act and the Commission's rules and regulations.[5] Here, however, the Division stated that it was unable to make that finding. Instead, the Division found it lacked sufficient information to find the Proposed Rule Changes consistent with sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Act.[6] The Disapproval Order rests squarely on the Division's repeated assertion that "[t]he Exchanges have not provided sufficient information to demonstrate that the market for the proposed Partial Cabinet Bundles is competitive."[7]

However, on the record before the Division, the Exchanges clearly demonstrated that the Proposed Rule Changes met all statutory and regulatory requirements. Indeed, the Exchanges' proposal is designed to, and will, enhance competition in the market for co-location services generally, and the market for bundled co-location services for small Users in particular, whereas the Division's contrary conclusion harms competition. The Disapproval Order also ignores essential facts, misapplies D.C. Circuit and Commission precedent, and disregards well-established principles that determine whether or not a market is competitive.

For these reasons, and as explained further in Sections IV.A-C, *infra*, the Exchanges petition the Commission to reverse the Disapproval Order and approve

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[5] 15 U.S.C. § 78s(b)(2)(C)(i).

[6] *See* Disapproval Order at 15-16.

[7] *See* Disapproval Order at 17; *see also id.* at 19 (the Exchanges' "arguments are not sufficient to demonstrate the presence of a competitive market for the proposed Partial Cabinet Bundles").

the Proposed Rule Changes, because the Disapproval Order (1) is contrary to the requirements of the Act, (2) is inconsistent with prior Commission rulings related to co-location and Partial Cabinet Bundles, (3) is arbitrary and capricious, and lacks substantial evidence, in violation of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1946), and (4) harms competition.

II.

THE PROPOSED SERVICES AND FEES

The Exchanges currently offer four PCS Bundles, Options A-D. The Commission approved these four PCS Bundles in 2016,[8] following a robust review.[9] In approving PCS Bundles, Options A-D in 2016, the Commission found that the proposal was

> consistent with Section 6(b)(4) of the Act. … With respect to the proposed [PCS] bundles in particular, the Commission also notes that all Users are subject to the same conditions and fees for the service selected; all Users are subject to the same limits on the number of [PCS] bundles and aggregate cabinet footprint; all Users that order a

[8] *See, e.g.*, NYSE comment letter (filed on behalf of all the Exchanges) dated July 6, 2021, from Elizabeth K. King, Chief Regulatory Office, ICE, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman Secretary, Commission ("July 6th Comment Letter") at 2. All comments on the Proposed Rule Changes are on the Commission's website. *See* Disapproval Order, at 2 (footnote 8).

[9] *See* July 6th Comment Letter at 2 & n.2; *see also* Securities Exchange Act Release Nos. 77072 (February 5, 2016), 81 FR 7394 (February 11, 2016) (SR-NYSE-2015-53); 77071 (February 5, 2016), 81 FR 7382 (February 11, 2016) (SR-NYSEMKT-2015-89); and 77070 (February 5, 2016), 81 FR 7401 (February 11, 2016) (SR-NYSEArca-2015-102).

> bundle on or before December 31, 2016 would have their monthly charges reduced by 50 percent for the first 12 months; and all Users that change their [PCS] bundles would not be charged a second initial charge but instead charged the difference, if any, between the initial charges.
>
> The Commission also finds the Exchange's proposal to offer [PCS] bundles consistent with Section 6(b)(5) of the Act. As noted, all Users seeking to purchase a [PCS] bundle would be subject to the same conditions. The Commission believes that the proposed [PCS] bundles are reasonably designed to make it more cost effective for Users with minimal power or cabinet space demands to take advantage of the option for co-location services, and therefore that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[10]

In August 2019, the Exchanges upgraded the 10 Gb LCN connections included in Options C and D from standard to LX connections.[11] In May 2020, the Exchanges further upgraded, at no additional cost, Options C and D to each add two 10 Gb connections to the NMS Network, an alternate dedicated network connection that co-location customers (referred to as "Users") could use to access the NMS feeds for which the Securities Industry Automation Corporation is

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[10] Securities Exchange Act Release No. 77072 (Feb. 5, 2016), 81 FR 7394, 7397 (Feb. 11, 2016) (emphasis added).

[11] *See* July 6th Comment Letter, at 2 & n.4; *see also* Securities Exchange Act Release Nos. 86550 (August 1, 2019), 84 FR 38696 (August 7, 2019) (SR-NYSE-2019-41); 86548 (August 1, 2019), 84 FR 38704 (August 7, 2019) (SR-NYSEAMER-2019-28); 86547 (August 1, 2019), 84 FR 38708 (August 7, 2019) (SR-NYSEArca-2019-54); 86549 (August 1, 2019), 84 FR 38700 (August 7, 2019) (SR-NYSENAT-2019-17).

engaged as the securities information processor ("SIP").[12]

On January 19, 2021, the Exchanges proposed two additional PCS Bundles –– "Proposed Options E and F." Proposed Options E and F would be substantially similar to Options C and D, respectively, with the difference being that each connection included in Proposed Options E and F would be 40 Gb instead of 10 Gb.[13] Specifically, Proposed Options E and F would include a 1 kW (Option E) or 2 kW (Option F) partial cabinet, one 40 Gb LCN connection, one 40 Gb IP network connection, two 40 Gb NMS Network connections, and either the Network Time Protocol Feed or the Precision Timing Protocol.[14] Under the Exchanges' proposal, Users selecting an Option E or F Bundle would be charged the same initial charge of $10,000 that currently applies to Options C and D, and would be charged monthly recurring charges of $18,000 for an Option E Bundle and $19,000 for an Option F Bundle.[15]

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[12] *See* July 6th Comment Letter, at 2 & n.42; *see also* Securities Exchange Act Release Nos. 88837 (May 7, 2020), 85 FR 28671 (May 13, 2020) (SR-NYSE-2019-46, SR-NYSE Amer-2019-34; SR-NYSEArca-2019-61, SR-NYSENAT-2019-19); and 88972 (May 29, 2020), 85 FR 34472 (June 4, 2020) (SR-NYSECHX-2020-18).

[13] *See* July 6th Comment Letter at 2.

[14] *Id.*

[15] *Id.*

Initially, the Exchanges proposed to give Users who purchased Proposed Option E or F before December 31, 2021 a reduction of the monthly service charges by 50% for the first year.[16] Given the passage of time while the Division considered the proposals, the Exchanges filed Partial Amendment No. 1, which sought to extend the date by which this discount could be obtained from December 31, 2021 to December 31, 2022.[17]

III.

PROCEDURAL BACKGROUND

As stated above, on January 19, 2021, the Exchanges filed the Proposed Rule Changes, which were published for comment in the Federal Register on February 5, 2021 and February 8, 2021.[18] On March 18, 2021, pursuant to section 19(b)(2) of the Act,[19] the Division designated a longer period for deciding whether to approve or

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[16] *Id.*

[17] Disapproval Order at 3, n.11.

[18] *See* Securities Exchange Act Release Nos. 91034 (February 1, 2021), 86 FR 8443 (February 5, 2021) (SR-NYSE-2021-05); 91035 (February 1, 2021), 86 FR 8449 (February 5, 2021) (SR-NYSEAMER-2021-04); 91036 (February 1, 2021), 86 FR 8440 (February 5, 2021) (SR-NYSECHX-2021-01); and 91037 (February 1, 2021), 86 FR 8424 (February 5, 2021) (SR-NYSENAT-2021-01); 91044 (February 2, 2021), 86 FR 8662 (February 8, 2021) (SR-NYSEArca-2021-07) (each, a "Notice"). For ease of reference, subsequent page citations relating to the Notices are to the Notice for NYSE-2021-05.

[19] 15 U.S.C. § 78s(b)(2).

disapprove the Proposed Rule Changes, or institute proceedings to determine whether to disapprove the proposed rule changes.[20]

On May 6, 2021, again acting pursuant to section 19(b)(2)(B) of the Act,[21] the Division instituted proceedings to determine whether to approve or disapprove the Proposed Rule Changes ("Order Instituting Proceedings").[22] The Exchanges responded with a detailed comment letter on July 6, 2021.[23]

The July 6th Comment Letter explains, in detail, why Proposed Options E and F satisfy all statutory and regulatory requirements. Proposed Options E and F provide smaller entities two new PCS Bundle options, without requiring anyone to purchase the new bundles and without imposing fees for such bundles on any entity that does not purchase them.[24]

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[20] *See* Securities Exchange Act Release Nos. 91357 (March 18, 2021), 86 FR 15732 (March 24, 2021) (SR-NYSE-2021-05); 91358 (March 18, 2021), 86 FR 15732 (March 24, 2021) (SR-NYSEAMER-2021-04); 91360 (March 18, 2021), 86 FR 15764 (March 24, 2021) (SR-NYSEArca-2021-07); 91362 (March 18, 2021), 86 FR 15765 (March 24, 2021)(SR-NYSECHX-2021-01); and 91363 (March 18, 2021), 86 FR 15763 (March 24, 2021) (SR-NYSENAT-2021-01).

[21] 15 U.S.C. § 78s(b)(2)(B).

[22] *See* Securities Exchange Act Release No. 91785 (May 6, 2021), 86 FR 26082 (May 12, 2021) (SR-NYSE-2021-05, NYSEAMER-2021-04, NYSEArca-2021-07, SR-NYSECHX-2021-01 SR-NYSENAT-2021-01).

[23] NYSE filed a comment letter on behalf of all the Exchanges. *See* letter dated July 6, 2021, from Elizabeth K. King, Chief Regulatory Office, ICE, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman Secretary, Commission ("July 6th Comment Letter"). All comments on the Proposed Rule Changes are on the Commission's website. See Disapproval Order at 2 (n. 8).

[24] The July 6th Comment Letter also noted that the Order Instituting Proceedings violated the Act's (and the Commission's regulation's) requirement (Continued …)

On July 30, 2021, pursuant to section 19(b)(2) of the Act,[25] the Division again designated a longer period to determine whether to approve or disapprove the Proposed Rule Changes.[26] On September 14, 2021, the Exchanges filed Partial Amendment No. 1, which extended the period for receiving a sign-up discount for those purchasing either Proposed Option E or F. The next day, on September 15, 2021, the Exchanges filed a second comment letter.[27] The September 15th Comment Letter supplemented the Exchanges' prior submissions by noting, *inter*

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that the Commission provide notice of grounds for disapproval under consideration. *See* July 6th Comment Letter at 2-4 (citing 15 U.S.C. § 78s(b)(2)(B) and 17 C.F.R. 201.700(b)(2)). That argument is a separate basis for reversing the Disapproval Order.

[25] 15 U.S.C. § 78s(b)(2).

[26] *See* Securities Exchange Act Release Nos. 92532, 86 FR 42911 (August 5, 2021) (SR-NYSE-2021-05, SR-NYSENAT-2021-01, SR-NYSEAMER-2021-04, NYSECHX-2021-01); 92531, 86 FR 42956 (August 5, 2021) (SR-NYSEArca-2021-07).

[27] *See* Disapproval Order at 3 & n.11; *see also* Partial Amendment No. 1 at 3-4; September 15, 2021 correspondence from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE to Vanessa Countryman, Secretary, Commission ("September 15th Comment Letter"). Partial Amendment No. 1 and the Second NYSE Response are available on the Commission's website at:

https://www.sec.gov/comments/sr-nyse-2021-05/srnyse202105.htm;
https://www.sec.gov/comments/sr-nyseamer-2021-04/srnyseamer202104.htm;
https://www.sec.gov/comments/sr-nysearca-2021-07/srnysearca202107.htm;
https://www.sec.gov/comments/sr-nysechx-2021-01/srnysechx202101.htm
https://www.sec.gov/comments/sr-nysenat-2021-01/srnysenat202101.htm.

For ease of reference, subsequent citations to Partial Amendment No. 1 and the Second NYSE Response are to the filings for SR-NYSE-2021-05.

alia, that "*89 percent* of the customers receiving bundled services from the Mahwah Data Center receive them from Hosting Users [*i.e.*, third-party competitors of the Exchanges], only *11 percent* purchase them from the Exchanges as one of the existing PCS bundled Options A-D."[28]

The Division issued the Disapproval Order on September 30, 2021. On October 7, 2021, the Exchanges timely filed a notice of intention to petition the Commission to review the Disapproval Order.[29] The Exchanges hereby file their Petition for Review and respectfully request that the Commission reverse the Division's Disapproval Order and approve the Proposed Rule Changes.

IV.

ARGUMENT

The Act, and its implementing regulations and rules, govern the approval process for the Proposed Rule Changes.[30] The Commission "shall" approve a proposed rule change if it is consistent with the requirements of the Act and its implementing rules and regulations.[31] An SRO bears the burden of establishing compliance with the Act.[32] As the Disapproval Order acknowledged, "the

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[28] September 15th Comment Letter at 1 (emphasis in original).

[29] *See* letter dated October 7, 2021, from Douglas W. Henkin to J. Matthew DeLesDernier, Assistant Secretary of the Commission. The Commission acknowledged that filing by letter dated October 8, 2021.

[30] Disapproval Order at 8-9, 13.

[31] Disapproval Order at 8 & nn. 32-34 (citing 15 U.S.C. §§§ 78s(b)(2)(C), 78(b)(2)(C)(i), 78(b)(2)(C)(ii) and 17 CFR 201.700(b)(3)).

[32] *See* 17 CFR 201.700(b)(3).

Commission applies a market-based approach to assessing [the] propriety of … connectivity fees."[33] In so doing, the Commission considers "'whether the exchange was subject to significant competitive forces in setting the terms of its proposal ... including the level of any fees.'"[34]

The Exchanges did not propose Proposed Options E and F in a vacuum. Through its prior findings and orders, the Commission began establishing the regulatory framework for PCS Bundles when it first considered, and approved, Options A-D five years ago. The Commission's approval of prior PCS Bundles encouraged the Exchanges and their Users to invest in, and use, PCS Bundles. The Commission's prior approvals established a regulatory framework that has provided significant benefits to the Exchanges and their Users by allowing the Exchanges to provide faster, more reliable transmissions of trades and other market data to Users that qualify for, and elect to purchase, the existing PCS Bundles. In short, the four PCS Bundles that the Exchanges proposed and implemented five years ago, with the Commission's blessing, have benefited the Exchanges and their Users.

The Division's refusal to approve Proposed Options E and F -- which no one is required to purchase, and which impose no fees or costs on any entity that does not choose to purchase one of the two new bundles -- cannot be squared with the

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[33] Disapproval Order at 13.

[34] *Id.* & n. 55 (citing, *inter alia*, *NetCoalition v. SEC*, 615 F.3d 525, 535 (D.C. Cir. 2010) (*NetCoalition I*) and SEC Release No. 59039 (December 2, 2008), 73 FR 7447, 7481; *see also* Disapproval Order at 9-10 (discussing *NetCoalition I* and identifying the same standard).

Commission's prior decisions. Indeed, the Disapproval Order fails virtually every statute, regulation, and binding case decision against which it can be measured. The Division's refusal to approve Proposed Options E and F, which are specifically designed to further enhance competition and expand the PCS bundle market to accommodate smaller customers, is inconsistent with the Act, is arbitrary and capricious and thus violates the Administrative Procedure Act, 5 USC §551 *et seq.* ("APA"), and ignores binding Supreme Court and D.C. Circuit precedent construing both the Act and the APA.

A. The Division failed to provide a "reasoned" basis for disapproving Proposed Options E and F, where the Commission had previously approved four other substantially similar PCS Bundles.

Twice previously, the Commission approved the Exchanges' 10 Gb PCS Bundles (Options A-D), including the fees charged for them, finding them consistent with the Act's requirements. In approving Options A-D, the Commission specifically found that they enhanced competition. The optional 40 Gb PCS Bundles the Exchanges now propose as Options E and F are substantially similar to the PCS bundles the Commission already approved. The Division found that the Exchanges had not demonstrated that Proposed Options E and F were permissible despite the Commission's prior approvals of the substantially similar Options A-D. For that reason alone, the Disapproval Order must be reversed.

As the Exchanges explained in their July 6th Comment Letter (at 2), in early 2016, the Commission approved the Exchanges' proposal to offer PCS Bundles, which were designed to attract smaller Users, including those with minimal power or cabinet space demands or those for which the costs attendant with having a

dedicated cabinet or greater connection bandwidth are too burdensome. As noted above, in approving those Bundle Options A-D in 2016, the Commission found that the proposed bundles "are reasonably designed to make it more cost effective for Users with minimal power or cabinet space demands to take advantage of the option for co-location services," and consequently that "they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers."[35]

The Commission again considered the four PCS bundles in 2020, when the Exchanges proposed to upgrade them by adding connectivity to the new, low-latency NMS Network.[36] The Commission approved these changes as consistent with the Act's requirements. It made all the same findings it had in approving the PCS Bundles in the first instance -- cost-effectiveness for Users, promotion of just and equitable principles of trade, and removal of impediments to a free and open market -- *id.* 2020 WL 23110943, at *6-7, and went on to add:

> In approving this proposed rule change … the Commission has considered the proposed rule's impact on efficiency, competition, and

[35] Securities Exchange Act Release No. 77072 (Feb. 5, 2016), 81 FR 7394, 7397 (Feb. 11, 2016) (emphasis added); *see supra* at 3-4 and n. 10.

[36] *See* Securities Exchange Act Release Nos. 88837 (May 7, 2020), 85 FR 28671 (May 13, 2020) (SR-NYSE-2019-46, SR-NYSE-Amer-2019-34; SR-NYSEArca-2019-61, SR-NYSENAT-2019-19); and 88972 (May 29, 2020), 85 FR 34472 (June 4, 2020) (SR-NYSECHX-2020-18).

> capital formation. See 15 U.S.C. § 78c(f). See discussion below in this Section IV stating the reasons why the Commission believes that the Amended Proposal, to provide co-location Users access to the new NMS Network without associated fee changes, does not impose a burden on competition that is not necessary or appropriate in furtherance of the Act. The Commission also believes that the proposed enhancements to the provision of consolidated market data are consistent with past Commission statements that the widespread availability of timely market information promotes fair and efficient markets.

Given this history, it was reasonable for the Exchanges to expect Proposed Options E and F to be similarly approved. Proposed Options E and F are just like the other PCS Bundles the Commission approved, except each connection in Proposed Options E and F would be 40 Gb instead of 10 Gb to help meet the needs of certain Users. Specifically, Proposed Options E and F are reasonably designed to make purchasing PCS Bundles more cost effective for customers that require 40 Gb connections but have minimal power or cabinet space demands.

Contrary to Commission precedent and the Exchanges' expectations, however, the Division found that Proposed Options E and F do not meet the requirements of the Act. Given the similarities between Options A-D and Options E-F, the Commission's prior findings as to the former should apply equally to the latter. And if the Division disagreed it should (at a minimum) be required to explain why.

The Disapproval Order contains no such explanation. Indeed, the Division failed to identify, and cannot reasonably identify, any factual basis on which to distinguish the PCS Bundles approved in 2016 and Proposed Options E and F. All the Division said on the issue was this:

> The evidence regarding Options A-D provided in the [Exchange's prior application] is not evidence regarding Options E-F, and so does not provide support for the Exchanges' competition arguments.[37]

That conclusory statement does not suffice as the "reasoned analysis" required for a departure from prior decisions required by the Supreme Court. In *Federal Communication Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), the Supreme Court held that where, as here, an agency changes a prior policy, it must include a "reasoned analysis for the change beyond that which may be required when an agent does not act in the first instance." And the agency must not only "display awareness that it is changing position," it must "show that there are good reasons for the new policy."[38]

The D.C. Circuit articulated the same rule in *Goldstein v. SEC*:

> By painting with such a broad brush, the Commission has failed adequately to justify departing from its own prior interpretation of [the statute]. … [T]he Commission does not justify this exception [to its prior rule] by reference to any changes in the nature of investment adviser-client relationships since the [rule] was adopted. Absent such a justification, its choice appears completely arbitrary.[39]

As the D.C. Circuit further explained in *NetCoalition I*, "[u]nder APA review an agency may not 'depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.' An agency acts arbitrarily by 'fail[ing] adequately to

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[37] Disapproval Order at 19.

[38] *Id.* at 515.

[39] 451 F.3d 873, 883 (D.C. Cir. 2006).

justify departing from its own prior interpretation' of a statute.'" *NetCoalition I*, 615 F.3d at 883-84 (quotations and footnote omitted).

The Disapproval Order is a clear violation of *Fox Television*, *NetCoalition I*, and *Goldstein*. Nowhere does the Division explain why or how the Commission's approval of PCS Bundle Options A-D as "consistent with the Act" was "flawed" in any respect. Nor does the Division suggest that the PCS Bundles and pricing the Commission previously approved are anti-competitive, ill-fit to prevent fraudulent and manipulative acts and practices, or in any way inconsistent with the requirements of the Act.

The Division's claim that the Exchanges submitted insufficient information in support of Proposed Options E and F makes no sense. The Exchanges previously submitted the same type of information in support of the previously-approved Options A-D. Nothing material has changed, except that the connections used in Proposed Options E and F would provide 40 Gb of bandwidth, not 10 Gb, which does no more than expand the range of co-location offerings available to Users and make this market more accessible to more Users.

In its attempted 180-degree turn, the Division faulted the Exchanges for not supporting Proposed Options E and F by providing pricing information about what some of its competitors (Hosting Users) charge.[40] But that information was never demanded before and, critically, is unobtainable by the Exchanges: the Exchanges

[40] Disapproval Order at 16-20.

do not know what Hosting Users competing against the Exchanges charge for the bundles they offer, precisely because those organizations are competitors of the Exchanges and are not required to publish or get approval for their fees.

In *Fox Television*, the Supreme Court admonished lower courts and agencies not to overturn prior agency action by "insisting upon obtaining the unobtainable."[41] "It is one thing to set aside agency action … because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable."[42] But that is precisely what the Division has done to the Exchanges in denying their Proposed Options E and F.

The Division further claims that its disapproval is justified by *Susquehanna International Group v. SEC*,[43] which prohibits the Commission from accepting the Exchanges' arguments with "unquestioning reliance."[44] But *Susquehanna* does not support the Disapproval Order. Unlike *Susquehanna*, the Exchanges have not asked the Commission to "take [their] word for it" – instead, it is clear from the record that the optional PCS Bundles E and F will enhance competition by providing additional options in an already competitive market. Indeed, the Exchange identified statements received from its customers that are appropriate for

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[41] *Fox Television*, 556 U.S. at 519.

[42] *Id*.

[43] 866 F.3d 442 (D.C. Cir. 2017).

[44] Disapproval Order at 21.

reliance upon to provide substantial evidence supporting agency action.[45] *Susquehanna* is a prohibition on agency action when faced with a lack of evidence, not permission for agency inaction when faced with evidence and prior consistent determinations.[46]

Finally, the Disapproval Order is silent on the reliance interests at issue, again violating *Fox Television*. The Supreme Court emphasized that where, as here, an agency flips its policy, "[i]t would be arbitrary or capricious to ignore … [the fact that] its prior policy has engendered serious reliance interests."[47] Since 2016, the Exchanges have been providing multiple (and completely optional) PCS Bundles to Users, with the express approval of the Commission. Several times over the ensuing years, the Exchanges have upgraded the services available in their PCS Bundles so that they remain useful to Users, and the Commission has not prevented the Exchanges from doing so. Now, the Exchanges seek to further upgrade their

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[45] *See, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 402 (1971).

[46] *Susquehanna* is also distinguishable in other ways. *First*, *Susquehanna* did not address an agency's unexplained departure from a prior interpretation or policy, such as here, which is forbidden by *Fox Television*. *Susquehanna* did not cite or discuss *Fox Television*. *Second*, *Susquehanna* dealt with a submission for an SRO capitalization plan that imposed mandatory obligations on members. But PCS Bundles are optional products, and the filings rejected by the Division impose no mandatory obligations on anyone but the Exchanges. Indeed PCS Bundles A-D were reviewed and approved by the Commission, with some of those approvals post-dating *Susquehanna*, and no one has suggested that the prior approvals were precluded by or needed to be revisited in light of *Susquehanna*.

[47] *Fox Television*, 556 U.S. at 515 (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996)).

PCS Bundle options to account for some Users' preference for 40 Gb connections, but the Division has suddenly decided to disapprove the Exchanges' innovation as anti-competitive.

There is no rational explanation in the Disapproval Order for why the Exchanges' PCS Bundle Options A-D are consistent with the Act's requirements, yet Proposed Options E and F are not. As such, the Disapproval Order is a quintessential example of an arbitrary agency decision that cannot withstand any measure of scrutiny under Supreme Court and D.C. Circuit precedent.[48]

B. The Market for the Proposed Services Is Competitive, with Substitute Services Available from Third-Party Providers

In the Proposals, the Exchanges amply demonstrated the existence of competition in the markets for the proposed services, and explained that substitutes for the proposed services are readily available from third-party providers.

Specifically, the Exchanges explained that they propose to offer PCS Bundle Options E and F in order to compete with bundled services that are offered to

[48] As explained *supra* at 7-8 and n.24, the Order Instituting Proceedings itself was invalid inasmuch as it violated the Act's (and the Commission's regulation's) requirement that the Commission provide notice of grounds for disapproval under consideration. As further described in the July 6th Comment Letter (at 4-7), the Division appeared to judge the Proposed Rule Change using the wrong standard -- non-binding staff guidance -- to require the Exchanges to provide both a market analysis and cost data. *NetCoalition I* makes clear that a proposed rule change can be supported with cost data or a market analysis (615 F.2d at 535), but that both are not required. *Id.* Both of these procedural deficiencies also render the Disapproval Order invalid.

customers by the Exchanges' Hosting Users.[49] Hosting Users are third parties that pay a monthly fee to the Exchanges in exchange for permission to subdivide cabinets and resell those partial cabinets, along with other services, to customers. Hosting Users are third parties that offer services in direct competition with the Exchanges themselves.

The Exchanges understand, from conversations with Users and potential customers, that Hosting Users generally sell services to customers via bundles ("Hosting User Bundles") that include cabinet space and space on shared LCN, IP, and NMS network connections. For instance, a Hosting User that has purchased 40 Gb LCN, IP, and NMS network connections from an Exchange is free to create bundled services for specific customers that include those 40 Gb connections, along with other services, such as cabinet space and cross-connections. The Exchanges understand from conversations with Users and potential customers that Hosting User Bundles generally provide their end users with a similar service to that of the Exchanges' PCS Bundles.

There is a major difference, however, between these Hosting User Bundles and the PCS Bundles that the Exchanges offer. Although the Exchanges are currently limited to the four PCS Bundles that have been approved by the Commission, Hosting Users are free to create a wide array of bespoke bundles of services for specific customers, charging whatever fees those customers will pay,

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[49] *See, e.g.*, Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40).

without having to file such services and fees with the Commission. Because Hosting Users are not required to obtain prior approval for such bundles (or their pricing) with the Commission, they have unfettered freedom to compete with each other and with the Exchanges in the market for bundled services.

The Exchanges have verified that approximately 10% of Users in co-location are Hosting Users capable of selling such bundles to customers. The Exchanges have further verified that *all* of the current Hosting Users have 40 Gb connections to the LCN, IP, and NMS Network, meaning that they can readily offer bundled services that include such 40 Gb connections to customers. Moreover, based on conversations with Users and potential customers, the Exchanges understand that at least one Hosting User currently does offer a Hosting User Bundle that includes 40 Gb connections.

Until the Exchanges are able to offer PCS Bundles that include such 40 Gb connections to Users, the Exchanges cannot compete with Hosting Users that provide such services. The Exchanges believe that 40 Gb connections are increasingly considered the industry standard, with more Users opting for 40 Gb connections instead of 10 Gb connections. In addition, the Exchanges understand that smaller customers – such as those who might qualify for PCS Bundles – often prefer to normalize all of their equipment to one connection size, meaning that if they have 40 Gb connections elsewhere on their network, they are uninterested in adding 10 Gb connections such as those available in the Exchanges' existing PCS Bundle options. This puts the Exchanges at a competitive disadvantage to not just Hosting Users, but also other third-party entities, including other exchanges, that

may offer such bundles. Moreover, 10 Gb connections simply lack sufficient bandwidth to meet some Users' needs. For instance, options market data from NYSE American and NYSE Arca generally exceeds the capacity of a 10 Gb connection, meaning that a User cannot access that data without a 40 Gb connection.

The Exchanges proposed PCS Bundle Options E and F in direct response to customer interest. One current customer of the Exchanges specifically requested that the Exchanges begin offering PCS Bundle options that include 40 Gb connections so that User could purchase its connections directly from the Exchanges instead of having to contract with a new service provider (*i.e.*, a Hosting User) for this one service. Upon learning that the Division had extended its time to consider the Exchanges' Proposals, this potential customer informed the Exchanges that due to the delay in the Exchanges' ability to establish PCS Bundles with 40 Gb connections, it planned to contract instead with a Hosting User that already offers such a bundle. This is clear evidence that the bundles offered by Hosting Users are substitutable with the proposed services in the Proposals.[50]

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[50] The Division has recognized that products may be substantially similar to be considered substitutable, and do not need to be identical or equivalent. *See* Securities Exchange Act Release No. 90209, (October 15, 2020), 85 FR 67044 (October 21, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSENAT-2020-08) at nn. 149, 150, 155 and accompanying text.

Nor is acquiring a partial cabinet from a Hosting User the only way that a customer could acquire services that are substitutable with those in the Proposals. Alternatively, a User could buy a partial cabinet from the Exchanges without any network connectivity, and then cross-connect to a Hosting User for access to its 40 Gb network connections. This option would have slightly longer latency than a partial cabinet bundle from a Hosting User or a PCS Bundle from the Exchanges, but it is a substantially similar[51] service, and might appeal to less latency sensitive customers. Customers could simply buy a partial cabinet as well as the 40 Gb connections from the Exchanges at the Exchanges' regular prices, without the lower pricing or the qualification restrictions that would apply to Proposed Options E and F.

All of the foregoing demonstrate that substitutes to the proposed PCS Bundles are available to customers. Because such substitutes exist, the Exchanges cannot impose supra-competitive pricing for their services without causing customers to shift their business to other providers of similar services.

In this context, the market – not the Commission – should decide whether the fees that the Exchanges have proposed for Options E and F are competitive. In the Proposals, the Exchanges justified their proposal to charge $4,000 more in monthly recurring charges for Option E as compared with Option C, and $4,000 more in monthly recurring charges for Option F as compared with Option D, as

[51] *Id.*

"reflect[ing] the fact that the Exchange[s] will have to supply multiple 40 Gb connections in the Option E and F Bundles, as opposed to the 10 Gb connections included in the Option C and D Bundles." This is common sense: higher bandwidth connections often cost more to supply than lower bandwidth connections. But in this competitive market, with at least five Hosting Users able to create bespoke User bundles containing 40 Gb connections, as well as the possibility for Users to create their own "bundles" by purchasing a partial cabinet from the Exchanges and cross-connecting to a Hosting User's 40 Gb connections, the Exchanges' costs in supplying the proposed PCS bundles are irrelevant.[52] Where substitutable services exist, if the Exchanges price their proposed bundles at a higher level than Users are willing to pay, Users will vote with their feet and obtain the connections they seek from one of the Exchanges' competitors.

The Division disapproved the Exchanges' proposal despite the fact that, as the Division recognized, the market for PCS Bundles could be "accessed ... from Hosting Users offering a similar product."[53] That finding should have been sufficient for approval. As the Supreme Court has explained, the availability of substitute products itself is evidence of a competitive market:

> It seems apparent that du Pont's power to set the price of cellophane has been limited only by the competition afforded by other flexible packaging materials. Moreover, it may be practically impossible for anyone to commence manufacturing cellophane without full access to

[52] *NetCoalition I*, 615 F.3d at 535.

[53] Disapproval Order at 17-18.

> du Pont's technique. However, du Pont has no power to prevent competition from other wrapping materials … .[54]

It is simply not the case that products must be identical to be substitutable.[55]

The Division ignores this, instead claiming that it "remains unclear how the presence of Hosting Users brings significant competitive forces to bear on Exchange pricing of the proposed products, if, as it appears, Hosting User access to the key services comprising the proposed Partial Cabinet Bundles is controlled by the Exchanges and the ability of a Hosting User to resell cabinet space … is contingent on payment of $1,000 per Hosted Customer for each cabinet in which such Hosted Customer is hosted."[56] The Division goes on to note that "[i]n order for [a Hosting User] to offer the substitute services that the Exchanges claim will bring competitive forces to bear on fees, a Hosting User must accept the Exchanges' operational environment, purchase the key services comprising the [PCS] Bundles (e.g., cabinet space, power, bandwidth connections) from the Exchanges, and bear the applicable Hosting Fees."[57] But all of that is also true

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[54] *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-94 (1956).

[55] *Id.*; *see also Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 108 F.Supp.2d 549, 575-76 (W.D. Va. 2000) ("A properly-defined product market thus must take account of which products, if any, compete with the defendant's product, and must include reasonably interchangeable substitute products that limit the defendant's ability to sustain an increase in price above competitive levels."); *Meijer, Inc. v. Barr Pharm., Inc.*, 572 F.Supp.2d 38, 56 (D.D.C. 2008) (*citing E.I. du Pont*, 351 U.S. at 395) ("[T]he ability of consumers to switch to a substitute [product] restrains a firm's ability to raise prices above the competitive level.").

[56] Disapproval Order at 18.

[57] Disapproval Order at 19.

with respect to the Commission-approved PCS Bundles A-D, and the Commission had no issue with that "operational environment" or the costs borne by the Hosting Users when it specifically approved those Bundles in 2016. Nor has the Commission or the Division even tried to suggest that anything was amiss in those prior approvals.

Moreover, the Commission itself approved the Exchanges' rule change that permits Users to become Hosting Users, as well as the per-Hosted Customer fees that such Hosting Users pay to the Exchanges.[58] "After careful review," the Commission approved those services and fees, noting its "belie[f] that this expansion of the scope of potential Users is consistent with the Exchange Act and should increase access to the Exchange co-location facilities by allowing additional categories of market participants to access the Exchange's co-location services."[59] The Commission further determined that the hosting fee is consistent with the Act, based on the Exchanges' representations that the fee would be "applied uniformly and will not unfairly discriminate between Users of co-location services, as the hosting fee will be applicable to all interested Users that provide hosting services."[60]

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[58] *See* Securities Exchange Act Release No. 34-65973 (December 15, 2011), 76 FR 79232 (December 21, 2011) (SR-NYSE-2011-53).

[59] *Id.*, 76 FR at 79233.

[60] *Id.*

As such, it is unclear what competitive issue the Division sees there. If the Division is suggesting that the Exchanges have some kind of monopoly on bundled co-location services, that position disregards both the evidence and long-settled principles articulated by the Supreme Court and numerous lower courts.

Nor is this a situation of a vertical price restraint, whereby the Exchanges seek to control the resale prices offered by the Hosting Users (which would not be *per se* anti-competitive even if it were true, which it is not).[61] To the contrary, as the Commission has long known, Hosting Users are unregulated entities with unfettered discretion to charge whatever they want to their downstream customers. The Exchanges have no say in what those prices are, have no idea what those prices are, and have no way to compete against the Hosting Users except to offer other alternatives (which is why they proposed Options E and F) for Users to consider. In the end, but for the Division's refusal to approve Proposed Options E and F, those Users would be free to accept or reject Proposed Options E and F based on their own economic self-interest. Nothing would require them to use Proposed Options E or F instead of going through Hosting Users (at least five of whom are ready to offer substitutes for Options E and F).[62]

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[61] *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (rejecting per se illegal rule for vertical agreements to fix minimum resale prices and noting both procompetitive and anticompetitive effects are possible).

[62] Disapproval Order at 18 (noting one of whom already has a customer).

In addition, as the Commission itself has previously recognized, another exchange can "propose a comparable pricing structure that would allow it to compete with the Exchanges":

> Nasdaq [The National Association of Securities Dealers Automated Quotations], like the Exchanges, provides connectivity to a consolidated market data feed (the "UTP SIP Feed"), as well as its own proprietary products, at its co-location facility. Whether connectivity services at co-location facilities are offered for multiple products or a single product, co-location customers generally are charged for connectivity by the Exchanges and Nasdaq based on the number of connections received and the bandwidth thereof. Thus, the Commission believes that Nasdaq could propose a comparable pricing structure that would allow it to compete with the Exchanges.[63]

But whether Nasdaq (or another exchange) in fact steps in to offer products competitive with the Exchanges' actual or proposed PCS Bundles (Options A, B, C, D, E, or F) is not the point; that they can do so is what ensures restraints on the Exchanges' pricing:

> [W]hen a producer deters competitors by supplying a better product at a lower price, when he eschews monopoly profits, when he operates his business so as to meet consumer demand and increase consumer satisfaction, the goals of competition are served, even if no actual competitors see fit to enter the market at a particular time. While the successful competitor should not be raised above the law, *neither should he be held down by law*.[64]

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[63] Securities Exchange Act Release No. 34-88837, 2020 WL 2310943 at *6-7.

[64] *U.S. v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990) (emphasis added)); *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000) ("If entry barriers to new firms are not significant, it may be difficult for even a monopoly company to control prices through some type of (Continued …)

Even if other exchanges opted not to provide PCS bundles, that still would not mean there is anti-competitive conduct by the Exchanges.[65] Again, it is the Hosting Users -- not the Exchanges -- that hold 89% of the downstream-user market.

C. The Disapproval Order Harms Competition

As detailed above, the Exchanges are already hobbled in the competitive market for PCS Bundles because Hosting Users and other third parties can provide such bundles or tailored bundles, while the Exchanges themselves cannot. As noted, Hosting Users are not regulated by the Commission, and are free to negotiate individual rates, increase or decrease prices, or favor some customers with faster connections. Hosting Users are also able to offer bundles to customers free of the additional qualification restrictions that Users of the Exchanges' PCS Bundles must meet. The Exchanges' proposal, in contrast, would establish

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exclusive dealing arrangement because a new firm or firms easily can enter the market to challenge it.").

[65] *See, e.g., Trace X Chem., Inc. v. Canadian Indus.*, 738 F.2d 261, 266 (8th Cir. 1984) ("a mere showing of monopoly power unaccompanied by evidence of anti-competitive behavior is insufficient to support a claim for monopolization"); *see also Navo S. Dev. Partners, Ltd. v. Denton Cty.*, 669 F.Supp.2d 747, 754 (E.D. Tex. 2009) ("There is no allegation that CoServ has engaged in any conduct to destroy competition. CoServ is the sole provider because it has filed for a Certificate [with the governing jurisdiction] and been awarded such. No other providers have filed. CoServ has done nothing to discourage other providers from filing for a Certificate… . CoServ's actions did not foreclose other providers and the fact that no other providers have applied does not make CoServ a monopolist.").

transparent, consistent pricing for two defined PCS Bundles with 40 Gb connections, thereby increasing the number of competitors providing such services and possibly disciplining the Hosting Users' tailored pricing practices.

Additionally, like the existing PCS Bundles A-D, Proposed Options E and F are designed to make it more cost effective for Users with minimal power or cabinet space demands to take advantage of the option for colocation services. Without the availability of Options E and F, Users that would find those options useful for their business needs would be forced to use an alternative provider of substitute services, or to forego the bundle option entirely and purchase from the Exchanges a partial cabinet, 40 Gb connections, and cross-connects, for a higher combined fee than the proposed fees for Options E and F. The Commission should be encouraging the Exchanges to upgrade their PCS Bundle offerings so that they remain attractive to the smaller Users who can qualify for them. The Disapproval Order does exactly the opposite.

The Commission has already determined, in 2016, that PCS Bundles aimed at Users with minimal power or cabinet space demands are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.[66] In light of that history, the Division's refusal to find the current Proposals consistent with the Act makes no sense.

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[66] *See* Securities Exchange Act Release No. 77072 (February 5, 2016), 81 FR 7394, 7397 (February 11, 2016) (SR-NYSE-2015-53).

CONCLUSION

For all the foregoing reasons, and the reasons stated in their Proposals and Comment Letters, the Exchanges respectfully request that the Commission reverse the Disapproval Order and approve the Proposed Rule Changes.

RESPECTFULLY SUBMITTED this 14th day of October, 2021.

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